Supreme Court, U.S.
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08-763 DEC 10 2008

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No. _____

IN THE

Supreme Court of the United States

JAMES MABRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID R. FINE
(counsel of record)
ANDREW L. SWOPE
K&L GATES LLP
Market Square Plaza
17 North Second Street, 18th Floor
Harrisburg, PA 17101
(717) 231-4500

Counsel for Petitioner James Mabry

QUESTION PRESENTED

In this case, the Third Circuit concluded that the holding of *Roe* v. *Flores-Ortega,* 528 U.S. 470 (2000) – that a criminal defense lawyer is constitutionally ineffective if he does not file a notice of appeal when his client instructs him to do so – does not apply when the client has entered into a plea agreement with a waiver of the right to appeal and to collaterally attack the sentence. The Third Circuit expressly rejected the contrary holdings of the Second, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits and announced that it "will part ways with the approach taken by the majority of the courts of appeals." The Seventh Circuit has now agreed with the Third Circuit.

The question presented is whether the holding in *Roe* v. *Flores-Ortega* is applicable in a *habeas* case where the defendant has entered into a plea agreement that includes a waiver of the right to take an appeal or to collaterally attack the sentence.

LIST OF PARTIES

Petitioner James Mabry is an inmate incarcerated in a federal institution in New Jersey pursuant to a sentence of the United States District Court for the Middle District of Pennsylvania. Respondent is the United States of America.

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Petitioner James Mabry respectfully requests that a writ of *certiorari* issue to resolve a split among the federal courts of appeals regarding both issues presented for review.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at *United States* v. *Mabry*, 536 F.3d 231 (3d Cir. 2008). The opinion of the district court (Appendix B) is unreported but available at *United States* v. *Mabry*, No. 04-120, 2006 U.S. Dist. LEXIS 29389 (M.D. Pa. May 15, 2006).

JURISDICTION

The court of appeals entered its judgment on July 28, 2008. Mr. Mabry filed a timely petition for *en banc* rehearing, which the court of appeals denied by order of October 1, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2255.

STATUTORY PROVISIONS INVOLVED

Section 2255 of Title 28, United States Code, is excerpted in relevant part in Appendix C.

STATEMENT OF THE CASE

Factual Background

On March 25, 2004, a federal grand jury returned a four-count indictment against Petitioner James Mabry charging him with possession with intent to distribute controlled substances (three counts) and possessing a firearm in furtherance of a drug-trafficking offense. *See United States* v. *Mabry*,

No. 04-120, 2006 U.S. Dist. LEXIS 29389 (M.D. Pa. May 15, 2006) (Appx. B at 25a-26a). Eight months later, the grand jury filed a superseding indictment that added an additional possession-with-intent-to-deliver count and a count for possession of a firearm by a person convicted of three felony crimes. *Id.*

Trial began with jury selection on May 3, 2005. Before testimony began, Mr. Mabry agreed to plead guilty to Count 3 of the superseding indictment (a claim for possession with intent to deliver a controlled substance). *Id.* The written plea agreement included the following language:

> 35. The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the conviction and sentence imposed. Acknowledging all of this, the defendant knowingly waives the right to appeal any conviction and sentence, including a sentence imposed within the statutory maximum, on any and all grounds set forth in Title 18, United States Code, Section 3742 or any other grounds, constitutional or non-constitutional, including the manner in which that sentence was determined in light of Blakely v. Washington, 124 S. Ct. 2531 (June 24, 2004). The defendant also waives the defendant's right to challenge any conviction or sentence or the manner in which the sentence was determined in any collateral proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255. The defendant further acknowledges that this appeal waiver is binding only upon the defendant, and that the United States retains the right to appeal in this case.

On March 3, 2006, the district court sentenced Mr. Mabry to 17 years and six months' incarceration.

Proceedings Below

On May 11, 2006, Mr. Mabry filed a motion to vacate, set aside or correct sentence. 28 U.S.C. § 2255. He claimed that his trial counsel gave him ineffective assistance in a number of respects. Most important for purposes of this petition, Mr. Mabry asserted that he expressly instructed his trial counsel to file a notice of appeal, and that Mr. Mabry learned after the appeal deadline that his trial counsel had not done so. Specifically, Mr. Mabry asserted in his Section-2255 motion that he instructed his trial counsel on March 3, 2006, and again on March 10, 2006, to file a notice of appeal and that his trial counsel repeatedly assured Mr. Mabry that he would make the filing but did not.[1]

By order of May 15, 2006, the district court denied Mr. Mabry's Section-2255 motion. (Appx. B at 31a) The district judge described the history of the case and then considered the four arguments Mr. Mabry raised in his Section-2255 motion. The district court asserted that the first two issues had not been raised before sentencing.[2] With respect to the third and fourth issues, the district judge held that he had

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[1] In *Campusano* v. *United States*, 442 F.3d 770, 775-76 (2d Cir. 2006), the Second Circuit properly noted that the merit of a *habeas* movant's appellate issues should not matter to the *Flores-Ortega* analysis. However, it is worth noting that Mr. Mabry intended to raise at least one issue on appeal that he believes would have demonstrated a "miscarriage of justice" sufficient under Third-Circuit precedent to overcome the appellate waiver. In sentencing Mr. Mabry, the district judge applied a two-level enhancement for possession of a dangerous weapon. *See* Section 2D1.1(b)(1) of the of the United States Sentencing Guidelines. However, a review of the record in the district court reveals that the government *never* offered competent evidence about a weapon.

[2] One of the two issues that allegedly had not been raised prior to sentencing was the sentencing enhancement related to the presence of a firearm during or in relation to a drug-trafficking offense. In fact, on August 3, 2005, Mr. Mabry filed a *pro se* list of objections to the presentence report. One of those objections was with respect to the presentence report's suggestion that there be a firearm enhancement.

already found them to be without merit. The district judge then pointed to the appeal and collateral-attack waiver, cited *United States* v. *Khattak*, 273 F.3d 557 (3d Cir. 2001), and held that there was no miscarriage of justice.[3]

Mr. Mabry took an appeal to the Third Circuit, which entered a certificate of appealability and appointed the undersigned as *pro bono* counsel.

Mr. Mabry argued first that the waiver was not knowing and voluntary. The Third Circuit rejected that argument based on its review of the agreement and the plea colloquy, and this petition does not seek review of that determination.

Mr. Mabry then argued that the waiver did not relieve his trial counsel of the duty to file a notice of appeal when instructed to do so and that the waiver did not preclude Mr. Mabry's raising his counsel's ineffective assistance in a Section-2255 motion. Mr. Mabry contended that *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), required his trial counsel to file the notice of appeal regardless of his opinion on the merits of the appeal in part because *Khattak*, the extant Third Circuit authority on waivers, always allows an exception to a waiver for a miscarriage of justice. *See also*, *Anders* v. *California*, 386 U.S. 738 (1967) (requiring counsel to file appeal and submit lack-of-merit brief). The Third Circuit rejected that argument as well.[4]

The court of appeals began its analysis by reiterating its holding in *Khattak* that waivers of the

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[3] In *Khattak*, the Third Circuit held that waivers of appellate rights are enforceable so long as they are knowing and voluntary but that there is an inherent exception to such waivers in the event of a miscarriage of justice.

[4] Mr. Mabry raised a third issue regarding the proper procedure for the appeals court to follow if it agreed with Mr. Mabry's position on the merits of the waiver issue. Because the court of appeals rejected Mr. Mabry's position on that point, it did not reach the third issue.

right to appeal included in plea agreements are enforceable if knowing and voluntary and there is no miscarriage of justice. (Appx. A at 9a-10a)

The Third Circuit then recited the holding of the Second Circuit in *Campusano* v. *United States*, 442 F.3d 770 (2d Cir. 2006), and noted that the Fifth, Ninth, Tenth and Eleventh Circuits had followed *Campusano*. The Third Circuit held, however, that "we believe that the other courts of appeals that have considered this issue have applied *Flores-Ortega* to a situation in which it simply does not 'fit.'" (Appx. A at 19a) Thus, it concluded that "we reject the approach taken in the *Campusano* line of cases as not well-reasoned." (Appx. A at 20a)

The Third Circuit then applied the miscarriage-of-justice test to the collateral-review waiver. It held that there were no non-frivolous grounds for appeal and, so, determined that the collateral-review waiver was enforceable. (Appx. A at 22a-23a)

Accordingly, the Third Circuit affirmed in a precedential opinion entered on July 28, 2008.

On August 11, 2008, Mr. Mabry filed a timely petition for rehearing before the panel or the *en banc* Third Circuit. The appeals court denied the petition on October 1, 2008.

REASONS FOR GRANTING THE WRIT

The federal courts of appeals are now deeply divided on the issue presented in this case. This Court should step in to bring uniformity to this recurrent and increasingly prevalent issue in federal *habeas corpus* law.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ABOUT WHETHER THE *FLORES-ORTEGA* RULE APPLIES IN CASES IN WHICH THE PLEA AGREEMENT INCLUDES A WAIVER OF THE RIGHT TO APPEAL.

When a lawyer fails to follow a defendant's instruction to file an appeal, that lawyer's performance is ineffective and counsel has acted in a professionally unreasonable manner. *Flores-Ortega*, 528 U.S. at 477.

In this case, the Third Circuit held that it would "part ways with the approach taken by the majority of courts of appeals" and refuse to apply the *Flores-Ortega* rule in a case in which a defendant entered into a plea agreement that included a waiver of the right to take an appeal and to collaterally attack the sentence imposed.

Seven of the federal courts of appeals apply the rule of *Flores-Ortega* notwithstanding the fact that the *habeas* movant entered into a plea agreement that includes an appeal waiver. *See, e.g., Campusano* (2d Cir.); *United States* v. *Poindexter*, 492 F.3d 263 (4th Cir. 2007); *Watson* v. *United States*, 493 F.3d 960 (8th Cir. 2007); *United States* v. *Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005); *United States* v. *Garrett*, 402 F.3d 1262 (10th Cir. 2005); *Gomez-Diaz* v. *United States*, 433 F.3d 788 (11th Cir. 2005). In *United States* v. *Tapp*, 491 F.3d 263 (5th Cir. 2007), the Fifth Circuit canvassed the holdings of its sister circuits, agreed with their reasoning and held that "[t]oday, we join our sister circuits in holding that the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal and collateral review." 491 F.3d at 266.

The only court of appeals that has substantially agreed with the Third Circuit's approach is the Seventh Circuit. In *Nunez* v. *United States*, 546 F.3d 450 (7th Cir. 2008), the Seventh Circuit expressly rejected the holdings of the seven courts of appeals listed above and essentially concurred with the Third

Circuit's result in this case. *See Nunez*, 546 F.3d at 454 ("In saying this, we recognize that seven courts of appeals have held that a waiver of appeal does not relieve counsel of the duty to file a notice of appeal on a client's request.").[5]

Thus, the courts of appeals are divided seven to two on the legal issue of whether the rule of *Flores-Ortega* applies in cases in which there has been a waiver of appeal. None of those courts has given any indication that they will retreat from their positions.[6] Moreover, the Third and Seventh Circuits have essentially carved out an exception to *Flores-Ortega* that this Court has not recognized.

As the citations in this petition demonstrate, the issue frequently arises (a majority of the courts of appeals have addressed the issue in just the last three years). The government continues to include appeal and collateral-review waivers in plea agreements and,

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[5] In *Nunez*, the Seventh Circuit upheld the waiver in a 2007 opinion. *See Nunez* v. *United States*, 495 F.3d 544 (7th Cir. 2007). The movant filed a petition for a writ of *certiorari* in this Court. The Court granted the petition (over the dissents of the Chief Justice, Justice Scalia and Justice Thomas) and remanded the case for reconsideration by the Seventh Circuit in light of the position taken by the Solicitor General in his response to the *certiorari* petition. *See Nunez* v. *United States*, 128 S. Ct. 2990 (2008). On remand, the United States Attorney conceded error by the district court and urged the court of appeals to consider the merits of the appeal. *See Nunez*, 546 F.3d at 456 ("The United States Attorney asserts that the waiver in the plea bargain does not cover the sort of argument that Nunez seeks to present and adds that a defendant has a constitutional right to have a lawyer file a notice of appeal on his behalf even after formally waiving that right."). After asserting that "[w]e accept the first part of the United States Attorney's current position but not the second," the Seventh Circuit went on to examine the application of *Flores-Ortega* and to decide that its holding does not apply in cases of appellate waiver.

[6] For example, the Fifth Circuit this year reiterated the holding in *Tapp*. *See United States* v. *Taylor*, 270 Fed. Appx. 363 (5th Cir. 2008). In 2007, the Tenth Circuit reaffirmed its 2005 holding in *Garrett*. *See United States* v. *Golden*, 255 Fed. Appx. (10th Cir. 2007).

so, the issue will arise with even greater frequency in the future. This Court should grant review on this issue to bring national uniformity to the question of whether the *Flores-Ortega* holding applies in cases in which there has been an appeal waiver.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION OF WHETHER A DEFENDANT WHO HAS PUTATIVELY WAIVED HIS RIGHT TO COLLATERAL REVIEW MAY ASSERT A *HABEAS* CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL RELATED TO COUNSEL'S FAILURE TO FILE A REQUESTED NOTICE OF APPEAL.

There is likewise a split among the circuits on the interplay between *Flores-Ortega* and a waiver of collateral-review rights, a question essentially subsumed within the question presented in this petition.

Several of the courts of appeals have applied *Flores-Ortega* in cases in which there were waivers both of appellate rights and of collateral-review rights. In *Campusano*, for example, the Second Circuit applied the *Flores-Ortega* holding notwithstanding the existence of a plea agreement that included both appellate and *habeas* waivers. In *Tapp*, the Fifth Circuit held that "we join our sister circuits in holding that the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal *and collateral review*." 491 F.3d at 266 (emphasis added). Other courts of appeals have likewise applied *Flores-Ortega* notwithstanding the presence of a collateral-review waiver. *See, e.g.*, *Campusano* (2d Cir.); *Garrett* (10th Cir.); *Gomez-Diaz* (11th Cir.).

In this case, however, the Third Circuit explicitly held that Mr. Mabry's waiver of his collateral-review rights compounded his waiver of his appellate rights and deprived him of any vehicle to raise his counsel's ineffectiveness. (Appx. A at 19a) In

reaching that holding, the Third Circuit rejected the holdings shared by almost all of the other courts of appeals to reach the question: "[W]e reject the approach taken in the *Campusano* line of cases as not well-reasoned." (Appx. A at 20a) The Seventh Circuit reached essentially the same holding in *Nunez*. *See Nunez,* 546 F.3d at 454.

There is an additional reason this Court should review the issue and sub-issue presented in this petition. As the cases cited in this petition demonstrate, most waivers include both appellate and collateral-review rights. Moreover, essentially all cases presenting the issue of the effect of an appellate waiver on the rule of *Flores-Ortega* arise through the vehicle of *habeas* applications because, by definition, in each case no direct appeal was taken. Thus, in order for the Court to review meaningfully the issue presented in this petition – the application of *Flores-Ortega* when there has been an appellate waiver – it must at the same time review the subsidiary issue regarding collateral review.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

DAVID R. FINE
(counsel of record)
ANDREW L. SWOPE
K&L GATES LLP
17 North Second St. 18th Fl.
Harrisburg, PA 17101
(717) 231-4500

Counsel for Petitioner
James Mabry

December 2008

Appendix A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2867

UNITED STATES OF AMERICA,

v.

JAMES MABRY
a/k/a James Young
a/k/a Manny

JAMES MABRY,
Appellant

Appeal from the United States District Court for the
Middle District of Pennsylvania
(D.C. Criminal No. 04-cr-00120)
District Judge: Honorable Malcolm Muir

Argued March 27, 2008

OPINION OF THE COURT

Before: McKEE, RENDELL and TASHIMA,* Circuit Judges.

(Filed July 28, 2008)

RENDELL, Circuit Judge:

James Mabry appeals from the District Court's denial of his habeas petition in which he claimed that his counsel was ineffective for failing to file an appeal. The District Court held that Mabry's claim was barred by the waiver in his plea agreement of his right to file a collateral attack. While the issue before us – which, we believe, involves the enforceability of the waiver – may seem straightforward, there is a body of caselaw in the courts of appeals – which, curiously, focuses not on the waiver but on the importance of the right to appeal – that complicates our analysis. Ultimately, we will affirm.

I. Facts and Procedural History

On March 25, 2004, a federal grand jury issued a four-count indictment against James Mabry. On November 18, 2004, a six-count superseding indictment was returned charging Mabry with possession with intent to distribute cocaine and crack, possession of a firearm during and in relation to a drug trafficking crime, and felon in possession of a firearm on several dates in March 2004. After a jury was selected for trial on May 3, 2005, Mabry entered into a written plea agreement pursuant to which he pleaded guilty to one count of the indictment, possession with intent to distribute more than five grams of cocaine base, in return for the

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* Honorable A. Wallace Tashima, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

government's dismissal of the remaining charges.

The plea agreement specifically provided that Mabry waived any right "to appeal any conviction and sentence, including a sentence imposed within the mandatory minimum, on any and all grounds set forth in title 18 United States Code, Section 3742 or any other grounds, constitutional or nonconstitutional." Plea Agreement ¶35. He also waived his "right to challenge any conviction or sentence or the manner in which the sentence was determined in any collateral proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255." *Id.* Mabry signed underneath an acknowledgment, which stated "I have read this agreement and carefully reviewed every part of it with my attorney. I fully understand it and I voluntarily agree to it." (J.A. 66).

In the course of a thorough change-of-plea colloquy, government counsel read relevant parts of the plea agreement, including the entire waiver provision, to the defendant. The Court then asked Mabry if he understood the plea agreement and received an affirmative answer. It confirmed that no promises or threats had been made to induce him to plead and that he had not been threatened with additional charges or other government action if he failed to plead. It verified that Mabry had discussed the terms of the Sentencing Guidelines with defense counsel and understood that the Court was not bound by the calculation of the Guidelines.

The Court discussed the waiver of direct appeal and collateral challenge rights at some length. It first referred Mabry to the appellate waiver in the plea agreement and asked whether he understood the meaning and effect of the waiver. It explained that "unless there is an error that results in a miscarriage of justice, you will have no right to challenge or appeal an incorrect or allegedly incorrect determination of the advisory sentencing

guidelines imprisonment range made by this Court" and inquired as to whether the defendant understood. (J. A. 198). The defendant answered both questions affirmatively.

The Court then turned to the waiver of the right to collaterally attack the sentence. Directing the defendant to that section of the plea agreement, the Court asked:

> Do you understand that although you will be sentenced after a very careful consideration of the advisory sentencing guidelines, unless there is an error which results in a miscarriage of justice, you will have no right to challenge in any appeal or collateral proceeding an incorrect or allegedly incorrect determination of the advisory sentencing guidelines? Do you understand that?(J.A. 198).

Once again, the defendant responded affirmatively. The prosecutor was asked to advise Mabry of the meaning of a collateral proceeding.

Defense counsel then explained the meaning of the appellate and collateral waivers in more depth:

> What the waiver of appeal, as his Honor just covered, is once the sentence is imposed you have given up your right to challenge the calculation which is advisory only of the sentencing guidelines. In addition to direct appeal rights, based on the frankly long standing rights going back to the Magna Carta, there's a right to what is called habeas corpus. Habeas corpus in the federal system has been codified to what is known as 2255. Essentially you are probably familiar with 2255. It is a right

> after direct appeal for you, for instance, to raise issues that may have to do with my ineffectiveness or other collateral issues that could not have been raised on direct appeal.
>
> By collateral, meaning those issues that would probably arise out of my effectiveness to represent you. So that this aspect of waiver of appeal is intended to cover not only your direct appeal rights, but once direct appeal is exhausted bringing a federal habeas corpus or a 2255 to raise other issues.
>
> Simply stated, you've agreed in this plea agreement that ultimately you will not raise any appeal issues concerning the advisory nature of the sentencing guideline calculation. Do you understand that? (J.A. 199-200).

Defense counsel thus specifically explained that Mabry's waiver included the right to assert that counsel was ineffective. In response to the Court's inquiry as to whether there was any doubt in counsel's mind that Mabry understood the plea, he agreed that Mabry fully understood the meaning and effect of the waiver. The Court then found that Mabry was acting voluntarily and fully understood the consequences of the waiver and accepted the plea. On March 9, 2006, Mabry was sentenced to 210 months' imprisonment followed by four years of supervised release.

On May 11, 2006, Mabry, proceeding *pro se*, filed a Motion to Vacate his sentence pursuant to 28 U.S.C. § 2255, along with an affidavit and memorandum of law with attachments in support of his motion. In the motion, he complained of counsel's failure to file an appeal notwithstanding his request that counsel do so. His affidavit contained

declarations related only to that issue. His memorandum in support of the motion outlined the four issues he would have raised on appeal. One sentence – "Counsel never presented any reasons to waive his client's right to appeal"--is the only reference to waiver in the filing. (J.A. 134). Mabry did not pursue or explain this statement further (indeed, it appears to refer to his argument that defense counsel never explained that any issues would be frivolous). Instead, his *pro se* memorandum of law continued with a discussion of the four issues that Mabry believes his counsel should have appealed. All challenged the correctness of the calculation of his sentence under the Sentencing Guidelines.[1]

On May 15, 2006, the District Court summarily denied the motion. It concluded that, because the four issues Mabry allegedly asked his counsel to raise were insubstantial and lacked merit, enforcement of the waiver of habeas did not work a miscarriage of justice, and Mabry's petition was therefore barred by the waiver. The Court opined:

> Mabry waived his right to challenge his sentence in a collateral proceeding, including by way of a section 2255 motion and there were no errors committed by this court which rise to the level of a miscarriage of justice which would entitle Mabry to pursue an appeal or collateral relief. *See United States v. Khattak*, 273 F.3d 557 (3d Cir.

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[1] Namely, (1) a two-point enhancement for possession of a firearm during and in relation to a drug trafficking crime under U.S.S.G. § 2D1.1(b)(1) should not have been applied; (2) a one-point deduction for acceptance of responsibility should have been applied; (3) defendant was improperly designated an armed career criminal under U.S.S.G. § 4B1.1; and (4) the criminal history category used by the District Court substantially overrepresented the defendant's criminal history.

> 2001) ("There may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver.") In the present case, we discern no errors whatsoever in the conviction or sentence imposed. (J.A. 21).

Although the Court referred to the waiver, it did not discuss the colloquy or whether it found the waiver to have been knowing and voluntary. The Court refused to issue a certificate of appealability, stating that any appeal from the order "will be deemed frivolous and not taken in good faith." (J.A. 22).

Mabry, still proceeding *pro se*, then sought a certificate of appealability from our Court. He contended that the District Court's conclusion that "there was no merits [sic] to appellant's constitutional claims, appellant had waived his appeal rights, defense counsel was not ineffective, and there was no substantial showing of a denial of a constitutional right" was in error. Request for a Certificate of Appealability Pursuant to Rule 22(a)(B)(2), Rules of Appellate Procedure ("Capp Motion") 5. In the same motion, Mabry urged the court to determine whether the waiver was made knowingly and voluntarily. He took the District Court to task for enforcing the waiver, alluding in general terms to his contention that the waiver was not knowing and voluntary. Capp Motion 9 ("[T]here is more than good reason, why, this Court should not enforce the waiver provision of the plea agreement, in light of *Campusano v. United States*, 442 F.3d 770, 2006. Under the circumstance here, there has been a miscarriage of justice, since the appeal waiver was not knowingly and voluntarily made by appellant.") (all grammatical errors in original).

Mabry did not contend, however, that he was misled in any way into pleading guilty or agreeing to

the waiver. Nor did his motion state, with any specificity, how the waiver might not be knowing or voluntary; he did not claim to misunderstand the waiver or assert any confusion as to the meaning of the term "miscarriage of justice" used by the Court during the colloquy.

In our Order entered on January 8, 2007, we granted the certificate of appealability as to the following issues:

> (1) whether appellant's waiver of his right to appeal and collaterally challenge his sentence was knowing and voluntary and whether that waiver is enforceable, *see United States v. Khattak*, 273 F.3d 557, 562-63 (3d Cir. 2001); (2) if so, whether that waiver either bars consideration of appellant's 28 U.S.C. § 2255 motion or precludes relief on the merits of his claim that his counsel rendered ineffective assistance by failing to file a requested appeal, *see, e.g., Campusano v. United States*, 442 F.3d 770, 773-75 (2d Cir. 2006); *Gomez-Diaz v. United States*, 433 F.3d 788, 793-94 (11th Cir. 2005); and (3) whether appellant is entitled to relief on the claims that he asserts his counsel should have raised on direct appeal. The Clerk will request counsel to represent appellant under Internal Operating Procedure 10.3.2.[2]

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[2] We later modified the third issue to read:

> whether, in the event the Court determines that there should be an evidentiary hearing to consider whether Mr. Mabry received ineffective assistance of counsel because he requested that his trial counsel file a notice of appeal and his trial counsel failed to do so, the Court should decline to address the merits of the claims Mr. Mabry would have raised on a direct appeal and should instead remand the case for such an evidentiary hearing

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and § 2255(d). *See United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007). We review the validity of a waiver *de novo*. *United States v. Khattak*, 273 F.3d 557, 560 (3d Cir. 2001).

II. Discussion

Criminal defendants may waive both constitutional and statutory rights, provided they do so voluntarily and with knowledge of the nature and consequences of the waiver. *See Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987); *Brady v. United States*, 397 U.S. 742, 752-53 (1970); *Adams v. United States*, 317 U.S. 269 (1942). The right to appeal in a criminal case is among those rights that may be waived. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). We have acknowledged the clear precedent validating waivers of basic rights, even in criminal cases.[3] *Khattak*, 273 F.3d at 561. Noting the

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for the reasons described in [*Campusano v. United States*, 442 F.3d 770, 775-76 (2d Cir. 2006)]. Order of Aug. 1, 2007 (granting appellant's motion to amend the certificate of appealability).

[3] In *Khattak*, we wrote:

> As the Supreme Court has stated, "A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States v. Mezzanatto*, 513 U.S. 196, 201, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995); *see also Peretz v. United States*, 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) ("The most basic rights of criminal defendants are...subject to waiver."). In every plea agreement, the defendant waives the right to a jury trial, the right to confront and cross-examine witnesses, and the right against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In addition, a defendant can waive his rights against double jeopardy and his Sixth Amendment right to counsel. *Ricketts v. Adamson*, 483 U.S. 1, 10, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) (double

benefits of such waivers to the defendant, government and court system, we have refused to find waivers of appeal rights violative of public policy. *Id.* at 562. Accordingly, we have been willing to enforce such waivers, provided that they are entered into knowingly and voluntarily and their enforcement does not work a miscarriage of justice. *Id.*[4]

In the instant case, for the first time, Mabry argues, through his new counsel, that his waiver was not knowing and voluntary.[5] More specifically, he

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jeopardy); *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (right to counsel).

> The United States Constitution does not guarantee a right to appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The right to appeal a criminal conviction is created by statute. *See* 18 U.S.C. § 3742. The ability to waive statutory rights, like those provided in 18 U.S.C. § 3742, logically flows from the ability to waive constitutional rights. *Teeter*, 257 F.3d at 22; *see also Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 21 L.Ed. 123 (1873) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."). If done knowingly and voluntarily, a statutorily created right to appeal is generally held to be waiveable. *Nguyen*, 235 F.3d at 1182 (noting "'the sole test of a waiver's validity is whether it was made knowingly and voluntarily'") (quoting *Anglin*, 215 F.3d at 1068). We agree.

273 F.3d at 561.

[4] In *Gwinnett*, we clarified that, even where the defendant has agreed to waive appellate rights, we have subject matter jurisdiction but refrain from exercising it "if we conclude that [a defendant] knowingly and voluntarily waived [his or] her right to appeal unless the result would work a miscarriage of justice." 483 F.3d at 203.

[5] That Mabry did not specifically challenge the waiver in his § 2255 motion before the District Court does not foreclose our review. He cannot be faulted for failing to raise an issue that is neither a basis for habeas relief nor related to his ineffectiveness claim. The fact that he had waived his right to

contends that the change-of-plea colloquy was inadequate and rendered the waiver not knowing, because the District Court should have, but did not, define "miscarriage of justice" or explain that the exception is particularly narrow. Furthermore, Mabry urges, based on the Supreme Court's opinion in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and opinions in the circuit courts applying *Flores-Ortega* in this situation, we must presume prejudice, rising to the level of a miscarriage of justice, and remand for an evidentiary hearing simply because there are allegations that counsel disregarded Mabry's instruction to file an appeal.

In response, the government argues that the waiver was knowing and voluntary and therefore valid. Because the waiver was valid and a defendant may waive his right to accuse counsel of post-sentencing ineffectiveness, the denial of the habeas petition should be affirmed. Accordingly, it says, the enforcement of the waiver does not result in a miscarriage of justice.

A. The Knowing and Voluntary Nature of the Waiver

The threshold issue before us is whether the waiver of collateral challenge rights in Mabry's plea agreement was knowing and voluntary. Under *Khattak* and *Gwinnett*, where there is a collateral waiver, our task on appeal of a denial of a habeas petition is to determine whether the District Court properly considered the validity of the waiver, specifically examining the (1) knowing and voluntary nature, based on what occurred and what defendant

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proceed with collateral review would have been a defense to his habeas claim raised by the government. The government, however, did not file an answer to the petition and had no opportunity to do so. The petition (framed as a motion to vacate) was filed on May 11, 2006, and the District Court filed its Opinion and Order on May 15, 2006.

contends, and (2) whether enforcement would work a miscarriage of justice. Whereas a defendant bears the burden of presenting an argument that would render his waiver unknowing or involuntary, a court has an affirmative duty both to examine the knowing and voluntary nature of the waiver and to assure itself that its enforcement works no miscarriage of justice, based on the record evidence before it. *Khattak*, 273 F.3d at 563. Even on summary dismissal under Rule 4(b) of the Rules Governing Section 2255 Proceedings for the U.S. District Courts, a district court should carefully examine both whether the waiver was knowing and voluntary and whether it results in a miscarriage of justice. Although our precedent has consistently followed this approach, we now reaffirm that a district court has an independent obligation to conduct an evaluation of the validity of a collateral waiver. Compliance with this obligation aids our review and ensures that the defendant's rights are carefully considered.[6]

Here, for the first time, in his counseled appeal, Mabry contends that the colloquy was insufficient because the term "miscarriage of justice" was not explained, rendering his waiver unknowing. Mabry alleges that a lay person could not be expected to understand "miscarriage of justice" as a narrow exception to the broad waiver in his plea agreement and might well understand it to bar a right to appeal only where the district court has not erred. Therefore, he urges:

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[6] The issue of the validity of a waiver in a collateral challenge comes to the District Court in the first instance upon the filing of the habeas petition, whereas the issue in an appellate waiver comes for resolution in the first instance to the appeals court. The inquiry is the same, although at different court levels. We review the former, and decide the latter in the first instance.

> The colloquy should have informed the defendant of the gravity of what he was giving up, and of the high hurdle he would face in trying to prove a miscarriage of justice. Those requirements are all the more important given the breadth of the waiver here, which, as noted above was broader than most. Fed R. Crim P. 11 and this Court's jurisprudence required a more informative colloquy than Mr. Mabry received.

Appellant's Br. 14.

In denying Mabry's petition for habeas, the District Court did not consider the knowing or voluntary nature of the waiver. We believe it should have done so. At minimum, it should have reviewed the terms of the plea agreement and change-of-plea colloquy and addressed their sufficiency.

Because the District Court did not do so, we will engage in an independent review of the record of proceedings to determine whether the waiver of habeas was knowing and voluntary. *See Gwinnett*, 483 F.3d at 203-04 (looking to the plea agreement and colloquy in turn to evaluate knowing and voluntary nature of the waiver). Mabry does not contend that he was actually misled, but instead levels a facial challenge. Accordingly, we will examine the written plea agreement and the change-of-plea colloquy on their faces.[7] The written plea agreement here clearly provides that the waiver is very broad, admits of no exceptions, and applies to both direct appeal and collateral challenge rights.

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[7] If Mabry were asserting that he was misled in some way, we might remand for a hearing and permit the District Court to consider the issue in the first instance. That is not the case here, and the record is sufficiently developed that we can decide the issue as ably as the District Court.

Counsel explained the waiver to Mabry and Mabry signed it, acknowledging that he understood the terms of the agreement.

The colloquy similarly countermands any suggestion that the waiver was not knowing and voluntary. Having scrutinized the colloquy as we are required to do when reviewing the enforcement of a waiver, we are satisfied that the district court "inform[ed] the defendant of, and determine[d] that the defendant underst[ood] . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence" as Federal Rule of Criminal Procedure 11(b)(1)(N) requires. Before the court accepted the plea agreement, it assured itself that Mabry had not been coerced or misled in any way into entering into the agreement. The court explained the waiver at some length, Mabry responded directly to the court's questions, the prosecution reviewed the waiver with the defendant in open court, and defense counsel was permitted to explain further.

Despite Mabry's arguments that the Court's failure to explain "miscarriage of justice" during the change of plea colloquy renders the waiver involuntary or unknowing, the Court's statement regarding miscarriage of justice is, in fact, a correct summary of the law. That the Court did not explain further or elaborate is not error. We know of no court that has imposed an obligation on sentencing courts to further define or characterize this term or advise a defendant of its practical applications. The phrase, on its own, connotes something grave and out of the ordinary; our ruling might be different if it seemed to except out mere legal error.

Mabry does not claim that there is any other flaw in the colloquy. Indeed, the colloquy amply demonstrates that the District Court took care to apprise Mabry of the consequences of the waiver and ensure that he understood the terms of the plea

agreement and entered into it willingly. Accordingly, we conclude that the waiver was knowing and voluntary.

B. Counsel's Failure to File an Appeal

Generally, having determined that the waiver was knowing and voluntary, we would consider whether its enforcement would work a miscarriage of justice in this case. Mabry, however, asserts that, even assuming that the waiver is knowing and voluntary, it should not be enforced, because there is a different standard when the defendant complains that he requested that counsel file an appeal and counsel failed to do so. Mabry argues that, under the Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), a presumption of prejudice applies where counsel fails to file a requested appeal even if the defendant has waived his appeal rights, and that, somehow, this requires us to remand for an evidentiary hearing even in the face of a waiver of collateral review. He relies heavily on the decision of the Court of Appeals for the Second Circuit in *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006), and urges that we follow its lead and disregard the existence of the waiver. He contends he is entitled to an evidentiary hearing to determine whether he instructed his trial counsel to file a notice of appeal, and, if so, he must be permitted to pursue a direct appeal.

Our Court has not yet considered this argument. Whether, where there are claims of ineffective assistance, *Flores-Ortega* changes our analysis of the validity of waivers of collateral review remains an open question.

There is admittedly some confusion in this area. This is largely due to the fact that, in a case that did not involve a waiver, the Supreme Court has given the right to appeal special significance as it

relates to ineffectiveness claims. In *Flores-Ortega*, the Supreme Court held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. at 480. The *Flores-Ortega* Court made clear that a presumption of prejudice applies in the context of an ineffectiveness claim because an attorney's deficient performance deprives the defendant of his or her opportunity for an appellate proceeding. *Id.* at 483. Notably, *Flores-Ortega* did not address whether this principle has any force, let alone controls, where the defendant has *waived* his right to appellate and collateral review.

Yet, some courts of appeals have approached the issue here, raised in the context of waiver, as if *Flores-Ortega* did indeed decide it. In *Campusano*, the key case applying *Flores-Ortega*, the Court of Appeals for the Second Circuit framed the issue as "whether the *Flores-Ortega* presumption of prejudice applies to a defendant who has waived appeal in a plea agreement." 442 F.3d at 773. Although the procedural posture of the case was the denial of the defendant's § 2255 motion, the court never even discussed the fact that the defendant had waived his habeas rights. It did not evaluate the validity of the habeas waiver, but instead skipped immediately to the merits of the argument raised in the § 2255 motion, namely whether trial counsel was ineffective in failing to file a direct appeal. Surprisingly, we think, a majority of other courts of appeals to consider the issue have engaged in similarly flawed reasoning and have reached the same conclusions.[8]

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[8] *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1195-99 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262 (10th Cir.

Instead of scrutinizing the waiver, these courts have focused on the importance of appeal rights as set forth in *Flores-Ortega* – a non-waiver case – and in reliance thereon permitted appeals explicitly barred by waiver.

Heretofore, only one court of appeals – the Court of Appeals for the Seventh Circuit – has disagreed with this line of cases and expressed its skepticism toward this over-expansion of *Flores-Ortega*. *Nunez v. United States*, 495 F.3d 544 (7th Cir. 2007), *vacated on other grounds*, 2008 WL 2484932 (U.S. 2008). In that case, faced with a defendant's assertions that he did not understand the plea and his lawyer failed to follow his direction to file an appeal, the court turned directly to an examination of the waiver of appeal and collateral challenge. Concluding that the plea was knowing and voluntary and the waiver should be enforced, the court held that the "claim of post-sentencing ineffective assistance falls squarely within the waiver." *Id.* at 546. The court then went on to note that, *in the absence of a waiver*, the filing of a notice of appeal is a purely ministerial task that could only help, not harm the defendant. *Id.* at 547 (citing *Flores-Ortega*, 528 U.S. at 477). By contrast, *where there is a total appellate and collateral waiver*, "counsel's duty to protect his or her client's interest militates against filing an appeal" which could cost the client the benefit of the plea bargain against his or her best interest. *Id.* at 548; *see also Sandoval-Lopez*, 409 F.3d at 1197 ("Sometimes demanding that one's lawyer appeal is like demanding that one's doctor perform surgery, when the surgery is risky and has an extremely low likelihood of improving the patient's condition.").[9] Thus, there is no reason to

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2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 791-94 (11th Cir. 2005).

[9] Even those courts that have applied *Flores-Ortega* in the waiver context have noted that presuming prejudice where there is a waiver makes little sense, because "most successful §

presume prejudice amounting to a miscarriage of justice in such a situation where the attorney's filing of an appeal would constitute a violation of the plea agreement, relieving the government of its obligations as well.

While we think the Seventh Circuit adopted the correct approach in *Nunez*, the Supreme Court recently granted certiorari in *Nunez*, vacating and remanding the case to the Seventh Circuit Court of Appeals "in light of the position asserted by the Solicitor General in his brief for the United States filed May 12, 2008." *Nunez v. United States*, S. Ct. , 76 U.S.L.W. 3666, 2008 WL 2484932 (2008). While the Solicitor General's brief takes many positions,[10] his dispositive position and advice to the Court, which would appear to have been heeded, faults the Seventh Circuit for reading the waiver too broadly.[11] Brief of the United States on Petition for a Writ of Certiorari, *Nunez v. United States*, S. Ct. , 76 U.S.L.W. 3666 (2008) (No. 07-818), 2008 WL 2050805. This concern is not present here given the broader waiver in this case and the nature of the issues Mabry would raise on appeal. While

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2255 movants in the appeal waiver situation obtain little more than an opportunity to lose at a later date." *United States v. Poindexter*, 492 F.3d 263, 273 (4th Cir. 2007); *accord Campusano*, 442 F.3d at 777 ("Admittedly, applying the *Flores-Ortega* presumption to post-waiver situations will bestow on most defendants nothing more than an opportunity to lose."). So doing, they reach results that are admittedly "contrary to common sense." *See Sandoval-Lopez*, 409 F.3d at 1196.

[10] Including the position that there really is no circuit split on the issue before us due to the failure of the courts of appeals to specifically address the issue of the effectiveness of the waiver. Brief of the United States on Petition for a Writ of Certiorari, *Nunez v. United States*, S. Ct. , 76 U.S.L.W. 3666 (2008) (No. 07-818), 2008 WL 2050805, at *12 We, however, view the caselaw as creating a split by disregarding the existence of the waiver.

[11] Properly read, it did not bar the appeal Nunez wished to pursue that complained of the lack of voluntariness of his plea agreement.

containing some discussion of the *Flores-Ortega* issue, the Solicitor General's brief actually urges the Court not to decide this issue, saying it need not do so because the issue "was not resolved below and did not form the basis for the judgment."[12] *Id.* at *12.

In any event, we believe that the other courts of appeals that have considered this issue have applied *Flores-Ortega* to a situation in which it simply does not "fit." The analysis employed in evaluating an ineffectiveness of counsel claim does not apply when there is an appellate waiver. While a defendant may be entitled to habeas relief if his attorney ineffectively fails to file a requested appeal because it is presumed to be prejudicial under *Flores-Ortega,* if that same defendant has effectively waived his right to habeas, he cannot even bring such a claim unless the waiver fails to pass muster under an entirely different test: one that examines its knowing and voluntary nature and asks whether its enforcement would work a miscarriage of justice.[13] Mabry, and proponents of the reasoning in *Campusano,* would somehow disregard or limit the effect of the waiver based upon the Supreme Court's view of the importance of the right to appeal and the impact of its loss by virtue of counsel's failure to act. But, as we noted above, both we and the Supreme Court have upheld the validity of *waivers* of rights to appeal. Surely, the right to appeal that has been waived stands on a different footing from a preserved right to appeal, both conceptually and in relation to counsel's duty to his client with respect thereto.[14]

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[12] The two-sentence order includes a vigorous three-judge dissent chastising the Court for, inter alia, vacating a judgment without deciding whether it was right or wrong.

[13] We note that while Mabry urges that the waiver is invalid based on the concept of presumed prejudice, the *Campusano* line of cases does not. Instead, they totally ignore the existence of the waiver.

[14] If this issue were limited to an ineffectiveness claim and were evaluated under a *Strickland* analysis, one would wonder how counsel's failure to file a notice of appeal could be

This distinction has been ignored by those courts of appeals adhering to *Campusano*'s analysis.

Accordingly, we reject the approach taken in the *Campusano* line of cases as not well-reasoned. Our reading of the cases indicates that they disregard the precise issue before them, and us: namely, the validity of the waiver. They seem to hold that waivers of collateral attack are automatically invalid because the non-waiver cases say that an attorney acts unreasonably and prejudice is presumed if he fails to file an appeal upon request. They do not resolve the threshold issue of whether the waiver of collateral review rights should preclude a petitioner from asserting a *Flores-Ortega* claim for a reinstated appeal in the first place. Often, they fail to address, let alone explain, that there even is a waiver of collateral attack. *See, e.g., Garrett,* 402 F.3d at 1266 (analyzing the issue as if only an appellate waiver existed and dismissing the total collateral attack waiver in a footnote because "the plain language of the waiver does not address the type of claim he has raised," seemingly imposing a requirement of heightened particularity in waivers of collateral proceedings).

We, therefore, will part ways with the approach taken by the majority of courts of appeals. Although vacated on other grounds, the *Nunez* opinion of the Court of Appeals for the Seventh Circuit presents the proper focus, namely giving effect to the waiver.[15] We will consider the validity of

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considered "outside the wide range of professionally competent assistance," if the right to appeal had been knowingly and voluntarily waived. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984).

[15] It is interesting to note that, in the *Nunez* case, the petitioner asked the Court to decide the *Flores-Ortega* issue, Petition for a Writ of Certiorari, *Nunez v. United States*, S. Ct. , 76 U.S.L.W. 3666 (2008) (No. 07-818), 2007 WL 4466866, but the Court, instead, remanded based on the breadth of the waiver. While it could be argued that the Supreme Court's

the collateral waiver as a threshold issue and employ an analysis consistent with other waiver cases. Having already determined that Mabry's waiver was knowing and voluntary, we now turn to an examination of whether enforcing the waiver here would work a miscarriage of justice.

C. Miscarriage of Justice

In the waiver context, we have adopted a common sense approach in determining whether a miscarriage of justice would occur if the waiver were enforced. In *Khattak*, 273 F.3d at 563, we endorsed the methodology of the Court of Appeals for the First Circuit, which suggested "the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result" as factors to consider before invalidating a waiver as involving a "miscarriage of justice." *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001). At the same time, we have declined to identify a list of specific circumstances which would give rise to, or constitute, a miscarriage of justice.

As in any other case in which the waiver is alleged to bar collateral attack, here we look to the underlying facts to determine whether a miscarriage of justice would be worked by enforcing the waiver. In the present case, it is undisputed that the waiver in Mabry's plea agreement was broad and offered no

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decision to look at the waiver signaled an affirmation of our review that the waiver should be the focus, it could also reflect a desire to decide the issue on that ground because the Solicitor General urged them to do so. Brief of the United States, *Nunez*, S. Ct. , 76 U.S.L.W. 3666 (No. 07-818), 2008 WL 2050805 at * 10.

express exceptions.[16] Only the miscarriage of justice exception is available. This is not a case where enforcing a collateral attack waiver would result in barring an appeal expressly preserved in the plea agreement. We have held that enforcing such a waiver would result in a miscarriage of justice. *United States v. Shedrick*, 493 F.3d 292, 303 (3d Cir. 2007) (invalidating a collateral waiver because defense counsel's constitutionally deficient conduct in failing to file an appeal as instructed deprived the defendant of "the opportunity properly to raise the issue he had previously expressed a desire for this Court to review and which he had explicitly preserved in his plea agreement and colloquy"). Nor is this a case raising allegations that counsel was ineffective or coercive in negotiating the very plea agreement that contained the waiver. *See, e.g.*, *United States v. Wilson*, 429 F.3d 455 (3d Cir. 2005) (stating that enforcing a waiver in connection with a coerced plea would work a miscarriage of justice, but then determining, based on the plea colloquy, that the plea was knowing and voluntary).

Under a proper analysis of the validity of the

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[16] A few comments are in order about the waiver in this case. First, although the sweep of this waiver seems particularly one-sided and unusually broad, we were reminded at oral argument by the Assistant United States Attorney that the government agreed to surrender a mandatory consecutive term of imprisonment of five years as part of the consideration for the plea agreement; something the government does not normally do. Second, if one were to question (although Mabry does not) whether the waiver is indeed broad enough to cover this type of alleged attorney ineffectiveness, *i.e.*, post-waiver failure to file an appeal, it should be readily apparent that this claim would not succeed in the unique fact pattern presented here where the issues that Mabry wished to pursue on appeal were clearly waived, and there was no allegation by him as to lack of voluntariness. Counsel's failure to file an appeal in such a situation could not be held to be sub-standard, nor did it result in any prejudice to Mabry. This is yet another example of why presuming prejudice is not appropriate where a waiver is present.

waiver here, we must conclude that enforcing the waiver would not result in a miscarriage of justice. Upon a careful review of Mabry's filings, we see that Mabry has not identified any nonfrivolous ground, not covered by the waiver, for a direct appeal or collateral attack in his petition, Capp Motion, his counseled brief, or any other filing. Mabry does not contend that he was misled or that enforcing the waiver is somehow unjust.[17] The issues Mabry seeks to raise on appeal are insubstantial and clearly encompassed by the broad waiver. They do not implicate fundamental rights or constitutional principles. The District Court's conclusion – that the purportedly appealable issues are not substantial and fall clearly within the terms of the waiver – is correct.

Enforcing the waiver is in line with justice, not a miscarriage of it. The waiver meets the two-prong test we use to evaluate waivers in that it: 1) was knowing and voluntary, as the colloquy was sufficient and Mabry has not indicated that he did not understand it, and 2) does not work a miscarriage of justice.[18]

In closing, we note that, from an analytic standpoint, the concept of a "presumption of prejudice" flowing from ineffectiveness that fits very comfortably in the *Flores-Ortega* setting where there is no waiver really does not suit the situation in which a waiver is present. Without a waiver, the

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[17] Like the *Nunez* court, we acknowledge that, in certain unique factual situations not presented here, defendant's counsel's failure to file an appeal even in the face of a waiver would result in a miscarriage of justice. *Nunez*, 495 F.3d at 547-48.

[18] We do not reach the last issue set forth in the certificate, as our focus is on the waiver of collateral review and we uphold it.

recognition of a defendant's right to an appeal is paramount and counsel's ineffectiveness clear, for the defendant was entitled to an appeal. With a waiver, that entitlement disappears, and the ineffectiveness of counsel in not pursuing a waived appeal is less than clear. The analysis of the waiver along the lines developed in our jurisprudence, which permits the court to refuse to enforce it if it would work a miscarriage of justice, allows consideration of fundamental fairness in a given situation.

For the foregoing reasons, we will enforce the collateral waiver provision of the plea agreement and will affirm the District Court's order.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA **No. 4:CR-04-120**

v.

JAMES MABRY

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The background of this case is set forth in prior orders of court and we will not repeat that background other than as needed to address Jame Mabry's motion to vacate, set aside, or correct sentence filed on May 11, 2006, pursuant to 28 U.S.C. § 2255.

On March 25, 2004, a four count indictment was returned by a federal grand jury charging Mabry with possessing with intent to distribute and distributing controlled substances (Counts 1, 2 and 3) and possessing a firearm in furtherance of a drug trafficking crime (Count 4). On November 18, 2004, a superseding indictment consisting of six counts was filed charging Mabry with possessing with intent to distribute and distributing controlled substances (Counts 1, 2, 3, and 4), possessing a firearm in furtherance of a drug trafficking crime (Count 5) and possessing a firearm after having been convicted of at least three crimes punishable by imprisonment for a term exceeding one year and constituting violent

felonies or serious drug offenses (Count 6).

The case was on the May, 2005, trial list and a jury was selected on May 3, 2005, However, after jury selection Mabry entered a plea of guilty to Count 3 of the superseding indictment and the Probation Office was directed to prepare a presentence report. The maximum penalty for that offense was 40 years imprisonment and a $ 2,000,000.00 fine. In committing the offense, Mr. Mabry supplied quantities of crack cocaine to a confidential informant. In pleading guilty Mr. Mabry accepted responsibility for the distribution of at least 5 grams of crack cocaine but less than 20 grams of crack cocaine.

Also, as part of the plea agreement Mabry waived his right "to appeal any conviction and sentence, including a sentence imposed within the statutory maximum, on any and all grounds set forth in Title 18, United States Code, Section 3742 or any other ground, constitutional or non-constitutional, including the manner in which the sentence was determined[.]" Mabry further waived his "right to challenge any conviction or sentence or the manner in which the sentence was determined in any collateral proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255."

A presentence report and addendum thereto were prepared and submitted to the court on September 21, 2005. Probation Officer Drew Thompson determined that the total offense level is 32, the criminal history category is VI and the guideline imprisonment range is 210 to 262 months.

A presentence conference was held on September 27, 2005, attended by assistant United States attorney McCann and defense counsel Farrell at which time it was agreed that counsel

would file briefs addressing (1) the objections asserted by Mabry to the presentence report and (2) the 18 U.S.C. § 3553 factors and the court so ordered. Mabry filed a brief on October 28, 2005. After being granted an extension of time, the Government filed a brief on December 14, 2005. A reply brief was due on January 3, 2006, but Mabry elected not to file one.

The brief submitted by Mabry addressed his objections to the presentence report and the section 3553 factors. By order of January 17, 2006, we overruled Mabry's objections to the presentence report and noted that we would consider all of the section 3553 factors at the time of sentencing.

The first objection to the presentence report was Mabry's claim that he should not be designated a career offender. Mabry was placed in criminal history category VI because he was found by the probation officer to be a career offender. Section 4B1.1 of the Sentencing Guidelines states in pertinent part as follows:

> A defendant is a career offender if (1) the defendant was at least 18 years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Mabry asserted that the simple assault convictions set forth in paragraphs 23 and 28 of the presentence report which triggered the application of the Career Offender provision should not have done so because while they were crimes of violence they were misdemeanors and

not felonies. This objection was meritless because U.S.S.G. § 4B1.2, Application Note 1, defines a prior felony conviction as "a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated a felony and regardless of the actual sentence imposed." The simple assault convictions each caried a maximum penalty of 2 years. Consequently, those convictions were felony convictions as defined by the Guidelines and required application of the Career Offender provision.

Mabry next contended that the six convictions set forth in paragraphs 22 through 27 should have been considered related for purposes of calculating his criminal history category. He contended that those six related cases were consolidated by the state court for disposition purposes and that he received a combined sentence of 1 1/2 to 3 years' imprisonment on all six.

Section 4A1.2(a)(2) of the Guidelines provides that "[p]rior sentences imposed in unrelated cases are to be counted separately." The commentary to that section states that "[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest . . . ."

Paragraph 22 of the presentence report revealed that Mabry was arrested on January 22, 1990, for criminal conspiracy and attempted theft by unlawful taking. Paragraph 23 revealed that Mabry was arrested for simple assault on February 25, 1990. Paragraph 24 revealed that Mabry was arrested on March 20, 1990, for attempted theft by unlawful taking. Paragraph 25 revealed that Mabry was arrested on April 16, 1990, for burglary and attempted theft.

Paragraph 26 revealed that Mabry was arrested on April 29, 1990, for criminal conspiracy, burglary and theft related offenses. Paragraph 27 revealed that Mabry was arrested on August 5, 1990, for theft related offenses. Because the offenses were all separated by intervening arrests under the Sentencing Guidelines they were not considered related offenses.

Although the six offenses occurred during a seven month period in 1990, they did not constitute a single series of acts culminating in an arrest. Instead, Mabry was arrested for each offense and released to the community pending trial. While in the community awaiting trial, Mabry engaged in new criminal conduct and was arrested again and again. Consequently, Mabry's objection to the Probation Officer counting each as a separate offense was devoid of merit.

Furthermore, even assuming for purposes of argument that the convictions in paragraphs 22 through 27 should have been grouped together, Mabry was still qualified as a Career Offender and was automatically placed in criminal history category VI because Mabry was convicted of simple assault on October 3, 1990 (paragraph 23) and on November 6, 2001 (paragraph 28).

To the extent that Mabry was arguing in his brief that we should depart downward from criminal history category VI because it substantially over-represented his prior criminal history or the likelihood of recidivism we rejected that argument. Section 4A1.3(b) of the Sentencing Guidelines states in pertinent part as follows:

> If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the

> defendant will commit other crimes, a downward departure may be warranted.

The Sentencing Guidelines specifically "authorize[] the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism[.]" *See* Commentary to U.S.S.G. § 4A1.3; *see also United States vs. Sanders*, 97 F.3d 856, 861 (6th Cir. 1996) (nothing in the sentencing guidelines prohibits departures below the armed career criminal history Category VI). Mabry as noted had five theft related convictions and two convictions involving violent felonies. We could not conclude that criminal history category VI substantially over-represented that record or the likelihood of recidivism. All of Mabry's objections were overruled in our order of January 17, 2006, because they were devoid of merit.

On March 3, 2006, Mabry was sentenced to a term of imprisonment of 17 years and 6 months. Mabry in the motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 claims that defense counsel failed to file an appeal. He further contends that counsel should have raised the following four issues on appeal:

> (1) he received an illegal 2-point upward adjustment in his offense level for possession of a firearm;
>
> (2) he should have received an additional 1-point downward adjustment for acceptance of responsibility;
>
> (3) he should not have been designated a career offender; and

(4) criminal history category VII substantially over-represented his prior criminal history.

The first two issues were not argued by Mabry prior to the imposition of sentence. The third and fourth issues were addressed by us and found to be without merit. None of the issues raised by Mabry has merit. Mabry waived his right to challenge his sentence in a collateral proceeding, including by way of a section 2255 motion and there were no errors committed by this court which rise to the level of a miscarriage of justice which would entitle Mabry to pursue an appeal or collateral relief. *See United States v. Khattak*, 273 F.3d 557 (3d Cir. 2001) ("There may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver."). In the present case, we discern no errors whatsoever in the conviction or sentence imposed.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Mabry's motion to vacate, set aside, or correct sentence (Doc. 118) filed on May 11, 2006, pursuant of 28 U.S.C. § 2255 is denied.

2. Any appeal from this order will be deemed lacking probable cause, *i.e.*, a substantial showing of the denial of a constitutional right, and a certificate of appealability will not issue.

3. Any appeal from this order will be deemed frivolous and not taken in good faith.

s/Malcolm Muir
U.S. District Judge

Appendix C

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.